BRB No. 05-1012 BLA

ARTHUR J. MOORE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	
	)	DATE ISSUED: 06/20/2006
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

James Hook, Waynesburg, Pennsylvania, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (04-BLA-0144) of Administrative Law Judge Daniel L. Leland rendered on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The administrative law judge noted that the instant claim was a request for modification, that employer conceded that claimant was totally disabled, and that the parties had stipulated to sixteen years of qualifying coal mine employment.[1] Decision and Order at 2-3; Hearing Transcript at 6; Director's

[1] Claimant filed his initial claim for benefits on October 26, 1977, which was finally denied by Administrative Law Judge Glenn Robert Lawrence on May 24, 1988.

Exhibit 60; Employer's Closing Brief at 3. The administrative law judge determined that the prior denial of benefits was based upon claimant's failure to prove that he has pneumoconiosis. The administrative law judge considered the newly submitted evidence of record, in conjunction with the evidence addressed in the prior denial, and concluded that this evidence was insufficient to establish modification as claimant failed to establish either a mistake in fact or a change in conditions pursuant to 20 C.F.R. §725.310 (2000).[2] Decision and Order at 6-10. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in failing to find the existence of pneumoconiosis established pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4). Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.[3]

Director's Exhibit 1. The Board affirmed the denial of benefits on February 28, 1990. Director's Exhibit 1. Claimant filed a second claim on March 25, 1993, which was denied by the district director on May 21, 1993. Director's Exhibit 2. Claimant took no further action and the claim was considered abandoned on September 2, 1993. Director's Exhibit 2. Claimant filed his third claim for benefits on April 21, 1999. Director's Exhibit 3. The district director made an initial finding of entitlement on December 13, 1999. Director's Exhibit 34. Employer requested a hearing and Administrative Law Judge Gerald M. Tierney denied benefits on February 27, 2002. Judge Tierney found that although claimant established a material change in conditions, the evidence of record was insufficient to establish the existence of pneumoconiosis. Director's Exhibits 57, 60. Claimant appealed to the Board, which affirmed the denial of benefits on October 31, 2003. Director's Exhibit 73. Claimant subsequently requested modification on May 22, 2004, which was denied by the district director on May 28, 2004. Director's Exhibits 77, 78. Claimant requested a formal hearing before the Office of Administrative Law Judges. Director's Exhibit 79.

[2] Because this claim was pending on January 19, 2001, the effective date of revisions to the regulations, the former version of 20 C.F.R. §725.310 applies to this claim. 20 C.F.R. §725.2(c); Decision and Order at 3.

[3] The administrative law judge's length of coal mine employment determination and his findings pursuant to 20 C.F.R. §§718.202(a)(2)-(3) and 718.204(b)(2) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Pursuant to Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, as incorporated into the Act by 30 U.S.C. §932(a) and as implemented by 20 C.F.R. §725.310 (2000), *see* 20 C.F.R. §725.2(c), a party may request modification within one year of a denial based on a change in conditions or because of a mistake in a determination of fact. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that if a claimant merely alleges that the ultimate fact of entitlement was wrongly decided, the administrative law judge may, if he chooses, accept this contention and modify the final order accordingly, *i.e.*, "there is no need for a smoking-gun factual error, changed conditions, or startling new evidence."[4] *Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993). Moreover, the court has held that pursuant to a petition for modification, the administrative law judge must review all evidence of record, both newly submitted evidence and evidence previously in the record, and determine whether there was any mistake of fact made in the prior adjudication, including the ultimate fact. *Id*.

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error. The administrative law judge rationally determined, based upon a consideration of all of the evidence of record, that claimant has not established the prerequisites for modification, as the evidence of record does not support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *See Jessee*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28; *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining*

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as the miner was last employed in the coal mine industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 4, 6, 7, 35.

Corp., 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971). Claimant contends that the administrative law judge's finding is in error, as the administrative law judge did not properly address the qualifications of the x-ray readers pursuant to Section 718.202(a)(1) and did not fully address Dr. Rasmussen's diagnosis of legal pneumoconiosis under 20 C.F.R. §718.202(a)(4). Claimant's Brief at 2-7. We do not find merit in claimant's arguments.

In addressing modification pursuant to Section 725.310 (2000), the administrative law judge weighed all of the evidence of record to determine whether claimant demonstrated a change in condition or a mistake in a determination of fact. The administrative law judge rationally found that Judge Tierney's Decision and Order did not contain a mistake of fact under Section 718.202(a)(1), as the preponderance of the x-ray readings by physicians with superior qualifications was negative. Director's Exhibits 12, 14, 15, 25, 27-32, 35, 36, 49, 54, 55; Employer's Exhibits 1, 3; Decision and Order at 7; *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Worhach v. Director,* OWCP, 17 BLR 1-105 (1993). In addition, the administrative law judge properly noted that the two newly submitted x-rays of record could not establish a change in conditions, as they were both read as negative for the existence of pneumoconiosis. Decision and Order at 3; Employer's Exhibits 1, 3.

With respect to Section 718.202(a)(4), the administrative law judge reviewed all of the relevant medical reports, including the newly submitted medical opinions of Drs. Rasmussen, Renn, and Spagnolo. Director's Exhibit 53, 77; Employer's Exhibits 1, 3, 5-7; Decision and Order at 8-9. The administrative law judge acted within his discretion as fact-finder in concluding that the opinions in which Drs. Rasmussen and Jaworski identified coal dust exposure as a cause of claimant's pulmonary disease were outweighed by the contrary opinions of Drs. Spagnolo and Renn, as well as Drs. Bellotte and Morgan. The administrative law judge rationally found that these physicians offered more thorough explanations of their conclusion that claimant's pulmonary disease was caused solely by cigarette smoking and that their opinions were well-supported by the objective medical evidence of record. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); Decision and Order at 8-9; Director's Exhibits 1, 53, 77; Employer's Exhibits 1, 3, 5-7. We affirm, therefore, the administrative law judge's determination that the Judge Tierney did not err in finding that the existence of pneumoconiosis was not established at Section 718.202(a)(4). We also affirm the administrative law judge's determination that the newly submitted medical evidence was insufficient to demonstrate a change in condition. *Jessee*, 5 F.3d at 725, 18 BLR at 2-28; *see Trent,* 11 BLR at 1-27*; Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Perry,* 9 BLR at 1-2; *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Finally, we must reject claimant's arguments the administrative law judge did not consider the latent and progressive nature of pneumoconiosis and did not weigh the evidence relevant to the existence of pneumoconiosis together in accordance with the decision of the United States Court of Appeals for the Fourth Circuit in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). In the present case, the administrative law judge could not merely rely upon the generally accepted fact that pneumoconiosis is a latent and progressive disease, but rather was required to base his findings upon the medical evidence of record. *White v. New White Coal Co.*, 23 BLR 1-1, 1-7 n.8 (2004). In addition, contrary to claimant's assertion, the administrative law judge weighed all of the different types of relevant evidence together to determine if the existence of pneumoconiosis was established pursuant to Section 718.202(a). Decision and Order at 10. The administrative law judge properly noted that as claimant failed to establish the existence of pneumoconiosis, claimant could not establish that his total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204. *See Trent*, 11 BLR at 1-27; Decision and Order at 10.

Accordingly, the administrative law judge's Decision and Order – Denying Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge